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No.

UNITED STATES SUPREME COURT

OCTOBER 1985 TERM

ROBERT EDWARD LEE.....Petitioner

-versus-

UNITED STATES OF AMERICA....Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

PETITION FOR CERTIORARI

J. Edward Bell, III
BELL, FLOYD, BELK, &
JERNIGAN
26 North Main Street
Post Office Box 460
Sumter, South Carolina
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QUESTIONS PRESENTED FOR REVIEW

1. Does the Government violate Brady v. State of Maryland, 373 U. S. 83 (1967), when it repeatedly represents to the court and to defense counsel that it will produce documents, and a confidential informant as a witness at trial who will give testimony that will totally exculpate the accused, knowing those representations to be false?

2. Does the Government violate Roviaro v. United States, 353 U. S. 53 (1957), when it repeatedly represents to the court and to defense counsel that it will produce a confidential informant as a witness at trial who will give testimony that will totally exculpate the accused, knowing those representations to be false?

3. Does it violate an accused's Fifth Amendment right to a fair trial when the court directs the accused to depend on the Government to produce a confidential informant, the chief witness for the accused's defense, when the Government has misrepresented to the court that it would produce that witness?

4. Does it compound the accused's constitutional hardship when he learns two days before the Government rests its case that the Government, after previously assuring the court that it would produce the accused's most vital defense witness, reveals that it will not do so?

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Fulton v. Warden, Maryland Penitentiary, 517 F.Supp. 485, (D.Md. 1981), affirmed 744 F.2d 1026 (4th Cir. 1984)

OPINIONS BELOW

United States Circuit Court of Appeals for the Fourth Circuit, No. 84-5262.

United States District Court for the District of South Carolina, Columbia Division, CR 83-20, CR 83-22.

JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals for the Fourth Circuit was filed on July 3, 1985. The motion for rehearing was filed in the United States Court of Appeals for the Fourth Circuit on July 17, 1985, and was denied on July 29, 1985. 28 U.S.C. § 1254(1), enacted pursuant to Article III, Section 2 of the United States Constitution, confers jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case by writ of certiorari.

STATUTES INVOLVED

Article V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Rule 52(a), Federal Rules of Criminal Procedure

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

On December 20, 1982, an airplane loaded with approximately 900 pounds of cocaine landed at the Sumter County Airport in Sumter, South Carolina. Petitioner Lee was traveling toward the Sumter County Airport in his mother's pickup truck when he approached a cordoned off road and a road block. At that time he was detained and later held for allegations which arose out of the cocaine smuggling venture. Later, Newby Franklin Love and Sue Robinson Youngblood were arrested and charged with a variety of cocaine related offenses in regard to this event.[1]

A preliminary hearing was held and at that time it was learned by petitioner's counsel that a confidential informant had supplied certain information to the Drug Enforcement Administration (DEA) in Miami. It was also learned that the information

supplied by the confidential informant in Miami was transmitted to the DEA in Columbia, South Carolina by telex. The telex stated:

December 17, 1982, Information had been had bee received that DEA fugitive Leonard Rosquette Naddis 3433, is part of a grp. planning to smuggle 900 lbs. cocaine via private aircraft into the area of Columbia, SC. The grp. has obtained a Cessna 404 Tital AC from Miami area firm, Southern Areo Traders Naddis 848490 and 127817, for this trip. The AC N-3234D is currently located Opa Locka Airport having wing locker tanks installed. The installation of these fuel tanks should be comple- ted by 12/19/82 and Rosquette anticipates that the AC will depart immediately. The pilot of AC has been tentatively ID as Garrett Clark Naddis 520757, who is also a DEA fugitive. Clark will allegedly be paid 180,000 dlrs for the trip.

The Government told the court at the preliminary hearing that the source of the information in the telex was a "confidential informant". After being asked the identity of the "confidential informant", the Government asked the court to allow them to withhold the name of the "confidential informant" for security reasons at this time because

the "confidential informant" would appear as a witness for the Government and his name would be forthcoming when he appeared in court. Based upon the assurances of the Government that the "confidential informant" would appear as a government witness, the court did not require the identity of the "confidential informant" to be released at that time.

Petitioner Lee timely filed a specific Brady Motion (See Appendix) requesting the materials germane to the telex and the documents relating to it, as well as a specific motion to require the government to disclose the name and address of the "confidental informant" which was the source of the telex.[2]
In response to the motions filed by petitioner Lee, the Government again indicated that the "confidential informant" would be produced as a witn

The Government represented on numerous occasions to the Court that the "confidential informant" would be produced as a witness at trial.[3] At the preliminary hearing the defense asked DEA agent Shumard the following question:

And in your Affidavit, you made the comment, or you made the statement that one of these people you are receiving information from was an associate of Love's. Is that the fourth person, or is that one of the three people? (Agent Shumard is talking about four different confidential informants involved in this case).

The Assistant United States District Attorney objected with the following language:

Your Honor, I will have to object right now and have a continuing
objection to any line of questioning that would attempt to reveal the

identity of any of these sources of information. I will state for the record the Government intends to call these witnesses at trial. (emphasis supplied)

At the pretrial motions hearings the Government again informed the trial judge, the Honorable Charles E. Simmons, Jr. that the Government intended to call the "confidential informant" who was the supplier of the information in the Telex as a witness.[4]

The "confidential informant" gave information to the DEA that the pilot of the cocaine-laden plane was Garrett Clark. Petitioner Lee was arrested, indicted, and tried for being the pilot of the cocaine laden plane. It is clear that the "confidential informant's" testimony was of paramount importance to the Petitioner's defense. Petitioner Lee, however, was placed in a position

of depending upon the Government for the sole source of his defense.

[1]Robert E. Lee, prior to December, 1982, owned a Chevrolet car dealership in Walterboro, South Carolina. Instead of selling his family farm in Sumter, he leased the farm to Sue Robinson Youngblood. Through this relationship Lee met Newby Love.

[2]The government had in its sole control the name and information about the confidential informant who would have been the defense's chief witness. It is most unusual that a defendant has to depend upon the Government to supply its defense witnesses.

[3]When those representations were made to the court, the Government knew that the confidential informant was missing and did not inform the court or the defense.

[4]It is interesting to note that it was the "confidential informant" who supplied the information in the telex that also would be the person who would identify the two Colombian nationals as the individuals who paid cash ($180,000) for the plane. If the "confidential informant" did not appear for trial, then the Colombians would have no direct testimony as to their alleged involvement whatsoever. In fact, without this testimony, the Colombians were acquitted.

ARGUMENT

At the outset, it is crucial to focus this Court's attention on the overriding issue in this case. Petitioner Lee thus directs the Court to the issues raised by all the Appellants before the Fourth Circuit. In contradistinction to his co-appellants before that court who raised only issues concerning the jury charges made by the district court, the petitioner raised issues of true constitutional merit. The Government based its case against the petitioner on his contribution to the cocaine importation scheme as pilot. In preparing and mounting his defense against the Government's case, petitioner Lee was denied access to and presentation of evidence that would have put the Government's case in doubt and would have affected the jury's verdict. Moreover, in the Fourth Circuit, the petitioner was again prevented from

making an effective presentation of these significant constitutional issues because of the page limitations imposed on this appellant. Of the sixty-five (65) alloted pages, petitioner Lee had only a mere five pages in which to present his constitutional claims.

In Brady v. State of Maryland, 373 U.S. 83,88 (1963), this Court stated:

> Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly.

American society has lost and our judicial system has suffered in this case because the petitioner, Robert Edward Lee, has been treated unfairly and imprisoned unjustly. As a result, the petitioner strongly urges this Court to grant certiorari because the United States Court of Appeals for the FourthCircuit "has so far departed from the usual course of judicial proceedings" and has "so far sanctioned

such a departure" by the United States District Court for the District of South Carolina "as to call for an exercise of this Court's power of supervision". Rule 17, Rules of the United States Supreme Court. There are three "special and important reasons" supporting a grant of certiorari in this case: (1) Brady v. Maryland, supra, and its progeny have been misinterpreted and misapplied to these unique facts; (2) likewise, Roviaro v, United States, 427 U.S. 97 (1976), and its progeny have been misinterpreted and misapplied to these unique facts; and (3) finally, neither of these errors are harmless.

We turn now to a discussion of these issues.

It is beyond dispute that Brady v. State of Maryland, 373 U. S. 83, 87, (1967), holds that "suppression by the prosectuion of evidence favorable to an accused upon request violates due

process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis supplied) The materiality aspect of Brady was clarified by this Court in United States v. Agurs, 427 U. S. 97 (1976). Where, as here, a defendant has made a request for specific information that is not disclosed, that information is considered material if it might have affected the outcome of the trial. Id at 104. See United States v. Heyward, 729 F.2d 297, 300 (4th Cir. 1984) (adopting materiality test). Cases interpreting this standard have held that a new trial is required "if there is a "reasonable possibility" that the undisclosed evidence would have materially affected the verdict." Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980). Further, it must be emphasized that this court has stated

that when a specific request for certain material has been made the failure of the Government to respond is "seldom, if ever, excusable". United States v. Agurs, supra, 427 U. S. at 106.

In the case under consideration, defense counsel made repeated specific requests for all documents relating to the confidential informant that the Government intended to identify and present at trial, and who was the source of the information contained in the telex. For example, when the Drug Enforcement Agency receives information from an informant, that information is recorded on a DEA-6 form. That form was requested, and was never received. Nor were the notes or memoranda of any contact the Government must have had with confidential informant Merola. Information from and about Merola was clearly material to petitioner Lee's defense that he did not pilot the

cocaine plane. As the source of theinformation in the telex and the owner of the airplane, Merola would have identified Garrett Clark as the pilot, rather than the petitioner. Moreover, Merola could identify the Columbians as participants in the smuggling adventure, rather than petitioner Lee. These facts, at the very least, give rise to the reasonable probability that the undisclosed evidence could have affected the jury verdict.

The petitioner finds ample support for his position that the undisclosed Brady material served to deny him a fair trial. In Anderson v. State of South Carolina, 542 F.Supp. 725 (D.S.C. 1982), affirmed 709 F.2d 887 (4th Cir. 1983), the court found the defendant's right to a fair trial had been denied by the prosecution's failure to make an autopsy report and investigative notes available to the petitioner's trial counsel in the

prosectution for the drowning murder of his wife because, as a composite, the material could have created a reasonable doubt in the minds of the jurors. After a careful review of the evidence before it, the district court stated:

> Under Agurs and Chavis, therefore, the tests of materiality of the autopsy report and the officers' reports are whether, as to the former, a timely delivery of the report "might have affected the outcome" of the petitioner's trial, and as to the latter items, whether a timely delivery of the reports of the officers would have created "a reasonable doubt that did not otherwise exist." ...the reports of hearsay about the age of the bruises on the victim's arms became inextricably entwined with the autopsy report, where the histological protocol raised a question of the time when the bruise on the right arm occurred. This development tends to merge the two basic reports into a homogeneous package of Brady material which blurs the distinction between them under Agurs as to their respective materiality. As a composite, the withheld material might well have created a reasonable doubt in the minds of jurors who deliberated thirty-two hours

> without knowledge of its existence before finding the petitioner guilty, and, a fortiori, the composite evidence, if known to the jury, and properly utilized by petitioner's defense attorneys, might have affected the outcome of the trial.

548 F. Supp. at 738 (footnotes omitted). See also United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), U. S. appeal pending (in prosecution of physician on numerous charges associated with submission of medical insurance claims, government's equivocation in making critical factual representations to district court and to defense counsel concerning its possession of exculpatory material, including insurer's survey of patients for whom physician performed services, compromised integrity of new trial proceedings and, as a result, denial of new trial motion could not stand).

Similiary, the Tenth Circuit in Chaney v. Brown, 730 F.2d 1334 (10th

Cir.) cert. denied 105 S.Ct. 601 (1984), found that the defendant's pretrial motion to produce which included fifteen paragraphs explaining precisely the type of exculpatory evidence that was being requested and the government notice of exactly what the defendant wanted was a specific request for Brady material. The court held that the FBI reports which were not disclosed to the defendant and which could have raised the inference that others than the defendant were involved in the kidnapping and murders for which the defendant was convicted could have affected the jury's imposition of the death penalty. Thus, in light of Brady's injunction that due process is violated where undisclosed evidence is material to guilt or punishment, failure to disclose the FBI reports was held to be constitutional error which rendered

the death penalty invalid. 730 F.2d at 1351-17.

No less than in Anderson v. State of South Carolina, supra; United States v. Alexander, supra; and Chaney v. Brown, supra, the undisclosed Brady material in the present case would have materially affected the jury's verdict. The undisclosed evidence went to the heart of petitioner's Lee defense: the evidence supported or would have supported his claim that he was not the pilot of the cocaine plane. In light of the law as applied to the facts of this case, petitioner Lee has been denied a fair trial as guaranteed by the United States Constitution.

At the pretrial hearing on February 11, 1983, the Government first informed the district court and defense counsel of the existence of a confidential informant and refused to divulge the identity of this informant for security.

The Government, however, assured the court that this confidential informant would be produced at trial and would testify for the prosecution. This was only the first of many such assurances. In response to the petitioner's Motion to Compel Disclosure of Identity of Informer (A. 87)and his supporting memorandum, (A. 87),Government again ensured the presence of the informant at trial (A. 96). Throughout the trial and, in fact, up until two days before the Government rested its case, the court and defense counsel were guaranteed that the confidential informant would be produced. (A.)It was only upon the court's direction on May 2, 1984, that the Government finally revealed the identity of the telex confidential informant as Joe Merola, the owner of the cocaine plane and an individual privy to vital information exonerating the petitioner Lee (A.).

It is highly significant that the Government became aware that confidential informant Merola would not be available for trial soon after the petitioner's arrest. Two grand jury and two trial subpoenas were issued to Merola without response. Moreover, Merola had even retained an attorney who asked the Government not to subpoena Merola (A 99). In spite of these events, the Government continued to assure Merola's presence at trial. When the district court ordered the Government to reveal Merola's identity on May 2, 1984, two days before the defense was to put on its case, only then did petitioner Lee have that information which was central to his defense. The petitioner thus found himself in an untenable position. Roviaro v. United States, 353 U.S. 53 (1957), and its progeny establish that the Government's conduct was improper,

prejudiced the petitioner in the preparation of his defense, and, as a result, reversal of his conviction is warranted.

Roviaro v. United States, supra, 353 U.S. at 62, the seminal case on disclosure of an informer's identity states:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Applying Roviaro to reverse a conviction where the unrevealed informant, an undercover detective, and the defendant were the only parties to the drug sale, the Fourth Circuit in McLawhorn v. State of North Carolina, 484 F.2d 1,5 (4th Cir. 1973), stated:

the privilege of nondisclosure ordinarily applies where the informant is neither a participant in the offense, nor helps set up its commission, but is a mere tipster who only supplies a lead to law investigating and enforcement officers.

Accord United States v. Brinkman, 739 F.2d 977 (4th Cir. 1984).

Although in its brief to the Fourth Circuit the Government attempted to characterize Merola as a "tipster", the record is replete with Government references to his status as a "confidential informant". Each time his availability at trial was assured, the Government referred to Merola as "confidential informant". Of even greater significance is the fact that Merola did far more than merely provide a lead to law enforcement officials investigating the drug importation scheme. Merola could identify two of

the Colombians who were defendants before the district court. His identification of these men was central to the Government's case against them as evidenced by the fact that without Merola's testimony, the Colombians were acquitted. Similarly, Merola's ability to identify Garrett Clark as the pilot of the cocaine plane was central to petitioner Lee's defense. Without that testimony, the petitioner was convicted. The importance of Merola's testimony to the petitioner is buttressed by the fact that Merola owned the cocaine plane that petitioner Lee is alleged to have piloted.

Applying the Roviaro balancing test to these facts, it is apparent that the nondisclosure of Merola's identity until two days before the defense was to present its case constitutes reversible error. The crimes charged related to the importation of cocaine. The

Government contended that the petitioner was the pilot of the cocaine plane; a contention petitioner Lee denied and attempted to disprove. Merola's testimony would have supported this denial, thereby effecting the jury's verdict. The Government's privilege not to reveal the identity of an informer is a qualified privilege, and as this Court recognized in Roviaro, supra, 353 U.S. at 60-61: [W]here the disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way". The privilege gave way in United States v. Ordonez, 737 F2d 793 (9th Cir. 1983), and United States v. Ayala, 643 F2d 244 (5th Cir. 1981), cases similiar to the one at bar, and likewise the privilege must give way here.

In its opinion, the Fourth Circuit stated that "regardless of the propriety of the trial court's decision," [in refusing to both admit the telex into evidence and to allow full cross-examination concerning its contents] "the error, if any, can only be considered harmless." The law of harmless error as stated in the Fourth Circuit, and as applied to the facts of this unique case, amply demonstrate that the errors at issue here are not harmless.

Even where there is ample evidence to sustain a petitioner's conviction, "an error cannot be deemed harmless if it might have contributed to the jury's verdict." Fulton v. Warden, Maryland Penitentiary, 517 F.Supp. 485, 489 (D.Md. 1981) (citing Chapman v. California, 386 U. S. 18, 24, (1967)), affirmed 744 F.2d 1026 (4th Cir. 1984). Where, as here, the errors were of

constitutional dimensions, the court must be convinced beyond a reasonable doubt that the errors could not have contributed to the verdict. United States v. Seidel, 620 F.2d 1006, 1013 n.13 (4th Cir. 1980; Fulton v. Warden, Maryland Penitentiary, supra, 517 F.Supp at 489.

In the present case, the evidence gives rise to at least a reasonable doubt that the Government's Brady and Roviaro violations contributed to the jury's verdict. From the date of the preliminary hearing on January 3, 1983, until May, 1984, two days before the defense began presentation of its case, the prosecution concealed the identity of confidential informant, Joseph Merola. Merola, the owner of the airplane, was the only person who could link the two Columbians to the drug transactions.

In additon, Merola was the only person who could exonerate petitioner

Lee as not being the pilot of the plane. It must be emphasized that in the absence of Merola's testimony the two Latins were acquitted and the petitioner was convicted. Without Merola's testimony, and without an adequate opportunity to prepare for trial in the absence of that testimony, the petitioner was severely and unconsitutionally hampered in preparing his defense. This situation is of course exacerbated by the fact that the Government had known that Merola would not be available at trial soon after the arrest of petitioner Lee. In addition, the Government opposed the production of any written statements made by any of the informants about any of the defendants.

Joseph Merola was a participatory informant in the drug transactions. Of even greater significance, he also owned the plane that carried the cocaine. The

pilot identified in the telex was Garrett Clark, an individual known to be involved in drug importation. Merola could certainly identify Clark as the pilot of the plane. The Government's case against petitioner Lee was based on his contribution as pilot. Where evidence disputing that contribution was kept from the defense, and ultimately from the jury, such evidence would have contributed to a different jury verdict and Robert E. Lee would be a free man today. In light of the petitioner's conviction and subsequent incarceration, these errors were not harmless beyond a reasonable doubt. United States v. Siedel, supra, 620 F.2d at 1013 n.13; Fulton v. Warden, Maryland Penitentiary, supra, 517 F.Supp at 489.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5171 (L)

United States of America,

Appellee,

versus

Newby Franklin Love,

Appellant.

No. 83-5172

United States of America,

Appellee,

versus

Newby Franklin Love,

Appellant.

No. 83-5173

United States of America,

Appellee,

versus

Robert Edward Lee,

Appellant.

No. 83-5173

United States of America,

Appellee,

versus

Sue Robinson Youngblood,

Appellant.

No. 83-5173

United States of America,

Appellee,

versus

Robert Edward Lee,

Appellant.

Argued: November 1, 1984

Decided: July 3, 1985

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., District Judge. (CR 83-20, CR 83-22)

Before ERVIN and WILKINSON, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Jack B. Swerling; J. Edward Bell, III: John L. Pollok (Edward Gasthalter on brief) for Appellants; Cameron B. Littlejohn, Assistant United States Attorney; David J. Slattery, Assistant United States Attorney (Henry Dargan McMaster, United States Attorney; Silvia K. Amaker, Paralegal Specialist on brief) for Appellee.

ERVIN, Circuit Judge:

Newby Franklin Love, Sue Robinson Youngblood, and Robert Edward Lee appeal from their convictions after a two-week jury trial on a nineteen-count superseding indictment alleging various drug related offenses. Specifically, the three appellants were convicted of violating the federal racketeering statute, 18 U.S.C. § 1962(c), (d) (1982), (i.e. the "RICO" statute) together with various federal drug laws, 21 U.S.C. § 841(a) (1), 846, 952(a), 960, 963 (1982).[2] In addition, Love and Youngblood were also convicted of

violating the Travel Act, 18 U.S.C. § 1952(a) (3) (1982), and of transporting stolen aircraft in interstate commerce in violation of 18 U.S.C. § 2312 (1982).[2] Love was also convicted of wilfully and knowingly engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848.[3] The three appellants were also acquitted on some of the counts charged against them.[4] Each appellant received substantial sentences.[5]

Appellants now assert a number of different grounds for reversal on appeal. After careful consideration of each allegation of trial error, we are convinced that reversal is not required. Consequently, we refuse to disturb the appellants' convictions and affirm the judgments of the district court.

I.

FACTUAL BACKGROUND

At the outset, it should be noted that the arrests of the appellants culminated an extensive investigation carried on over several months by federal and state agents in South Carolina, Georgia, and Florida. The facts of this case are very complex as they involve many separate incidents which together comprise the basis for the appellants' arrests and convictions. As a consequence, only the facts pertinent to this appeal will be summarized. For our purposes, the appellants' illegal activities may be separated into three broad categories: (1) the drug-related activities of 1980-1981, (2)the armed robberies and cocaine trafficking in 1982, and (3) the drug smuggling operations in 1982.

A. Drug-related activities of 1980-1981

Love and Youngblood's 1980-1981 drug-related activities constitute the

earliest overt acts upon which their Court 1 RICO conspiracy convictions are based. These activities revolve around their relationship with two drug dealers, Elmer Charles Dalton and James Milton King. Dalton and King were involved in a number of profitable interstate cocaine and marijuana sales with Love between September 1980 and January 1981. Love sold Dalton and King large quantities of marijuana and cocaine for later resale and distribution on several different occasions during this period. Dalton and King had been introduced to Love by Youngblood who also was involved in at least one of these interstate drug transactions. Lee, however, was not implicated in any of these early drug activities.

B. Armed robberies and cocaine trafficking in 1982

Beginning some time prior to 1982, Youngblood and Love became engaged in a drug trafficking partnership in which Youngblood supplied Love with cocaine, which she transported to South Carolina from Florida. Love then sold this cocaine to dealers throughout the region. This partnership eventually blossomed into the drug smuggling operations of June-December, 1982. In addition, Wilber Rutledge "Rusty" Corvette and Ralph Bruce Bannister were hired by Love in 1982 to commit several robberies of competing drug dealers and other individuals who Love felt would be unlikely to report such crimes to the authroities. Corvette and Bannister usually sought Love's prior sanction of these robberies to insure that the victim was not a distributor of drugs supplied by Love. In most instances, Love furnished the weapons and vehicles used in the robberies and afterwards

received jewelry or other proceeds of the crime. Youngblood was aware of these robberies and also received proceeds in at least one instance.[6] However, Lee was not involved in any of these robberies.

C. Drug Smuggling Activities of 1982

During the latter half of 1982, Youngblood and Love arranged several unsuccessful attempts to import marijuana and cocaine directly to South Carolina from Colombia. Their first smuggling venture was attempted in June of that year. At that time, Love told Corvette that he was planning to bring 1200 to 1500 pounds of marujuana to South Carolina from South America by plane. Together Love and Corvette went to Florida to meet Youngblood and discuss this operation. Soon after this meeting, they attempted the smuggling

run and dispatched a plant to South America.

On June 15, 1982, Love, Corvette and Wayne Rodgers prepared to meet the marijuana-laden plane at a drag strip near Columbia on its return from South America. However, because of communications mishaps and lack of fuel, the plane did not land at the drag strip. Instead, the plane was abandoned at a small airport in Columbia, South Carolina. It was found the next day by law enforcement officials. Examination of the plane revealed that its long-range fuel tanks contained only 8-10 gallons of fuel. In addition, its seats had been removed, and there were 18 bales of marijuana weighing 541 pounds on board. The landing flaps had not been closed and the door to the cockpit had been left ajar. Fingerprints taken from the fuselage and from food wrappers and navigational

charts found in the cockpit subsequently were identified as those of Timothy Roy Rivera. Millard Waites, a convicted drug smuggler, testified at trial that prior to the flight he had given Rivera's name and telephone number to Love after Love asked him for the name of a pilot. Love subsequently hired Rivera for the smuggling job.

Several weeks after this failed attempt, Love told Corvette that he had obtained another plane for a smuggling trip to South America. Once again Rivera was to be the pilot for the Love-Youngblood smuggling operation. Once again, however, this run was aborted when the plane crashed on the way to South America.

Afterwards, in August, 1982, Love, Waites, Kenneth Davidson, Youngblood, Rivera, Rivera's brother, and Corvette met at Love's apartment to plan their next smuggling venture. As a

first step, Youngblood, Rivera, and Rivera's brother stole a Cessna 404 Titan airplane from Trager Aviation Company in Lima, Ohio. After redesigning the plane to transport drugs, Rivera again piloted the plane to South America. John Furmen Walker, alias "Double R", accompanied him on this trip. Success eluded them another time, however, when they ran low on fuel during the return trip, and were forced to land in Sarasota, Florida. Although the police discovered the plane before they could unload the marijuana, Rivera and Walker were able to escape. The police discovered 46 bales of marijuana weighing 1594 pounds on board the plane when they arrived.

A fourth attempted smuggling run was scheduled for November, 1982. For this next venture, Love sought a pilot who could fly a large cargo plane. Love requested that Joe Merolla, the owner of

the airplane leasing company Southern Aero Traders, ask Frank Kelly, an Opa Loca, Florida airport employee, to evaluate Rivera and another Colombian pilot from Southern Aero Traders to see if they could fly a large cargo plane. Unknown to Love, Merolla and Kelly were DEA informants. Kelly evaluated the two pilots and concluded that they could not fly large cargo planes. Youngblood then offered Kelly $50,000 to fly the plane to South America himself. Kelly accepted and was paid $5000 by "Double R". Kelly later met with "Double R", Youngblood and Love to discuss the details of the smuggling run. He learned that the first plane load would contain 4500 pounds of marijuana. That was to be followed by a load of cocaine two days later. At this meeting, Love told Kelly that the two Colombians had lost three of his planes while one of

his Howard 250 aircraft had already made six successful trips to South America.

Following this meeting, appellant Lee came to Opa Loca to be Kelly's co-pilot. The trip was postponed several times as Kelly repeatedly tried to avoid making the trip. Finally Kelly, Lee, "Vargas" (a Colombian dealer) and "Double R" took off for South America. Kelly deliberately closed the flaps on the plane which caused the engine to overheat and forced them to land at New Smyrna Beach, Florida. After making repairs, "Double R" and Vargas then continued on to South America.

Meanwhile, Love and Corvette readied themselves for the arrival of the plane back in Sumter County with a group of ten men bearing machine guns and hand grenades. Love told Corvette that the extra men were there to fight the police if the need arose. A couple

of days later, Love and Corvette learned that the plane had blown up after taking off with the marijuana on board in Colombia. Despite this fourth setback, Love and Youngblood did not waste time in planning what was to be their fifth and final unsuccessful smuggling venture together.

In early December, 1982, Joe Merolla informed the DEA that Leo Resquette and others were planning to smuggle 700 to 800 pounds of cocaine from Colombia to Love in South Carolina around December 20, 1982. Merolla kept the DEA apprised of this venture daily since his company was installing long range fuel tanks in a plane the smugglers had just bought from him in Opa Loca for the smuggling trip. In addition, Merolla installed an electronic beeper on the modified plane to monitor its flight path once it was airborne.

On December 19, 1982, Lee flew the plane from Opa Locka to New Smyrna Beach where he met Youngblood. He then flew on to South America. After the plane left New Smyrna Beach, federal and state officers set up surveillance teams at the Lee farm in Sumter County (the suspected primary landing site), the Sumter County airport, and the Walterboro airport. At 9:10 p.m. that evening, the Walterboro team heard the plane's beeper signal and radioed that the plane was heading for Sumter.

At some time after 9:00 p.m., the pilot of the plane called the Sumter airport for clearance to land. At trial, two men who knew Lee well identified the taped voice of the pilot as that of Lee. The plane then landed at the Sumter County Airport at 9:47 p.m. After the arrival of the Customs helicopter at 10:30 p.m., the airport surveillance team secured the area. The

airport was sealed and a search ensued. At 10:45 p.m., defendant Gonzales-Fuentes was found hiding under a ledge in the shrubbery next to the terminal building and was arrested. He was carrying $4000 in cash, a passport and a round-trip ticket from Medellin, South America to Miami, Florida, on which the return trip had not been used. He also reeked of chemicals.

A search of the plane at the airport uncovered 20 duffel bags containing 955.1 pounds of cocaine with an estimated street value of $350 million. On top of the duffel bags was a clothes bag containing two letters addressed to Lee from his attorney, a monogrammed shirt with the initials "REL", a thermos bottle later determined to have Lee's fingerprints on it, aeronautical charts in Lee's handwriting and flight plans from Monteria, South

America and Riohacha, South America to South Carolina.

Meanwhile, police officers at the Lee farm stopped a motor home and arrested its occupants, defendants Ruiz and Restrepo. At the same time, officers stopped a pickup truck with a camper in tow on an access road at the end of the Sumter County runway. The driver was Lee. He appeared exhausted and reeked of chemicals.

Later that night, at approximately 2:15 a.m., Love and Youngblood drove to the Lee farm which by now was secured by agents, and parked in the carport. Agents immediately converged on the car to prevent the appellants from leaving. Upon learning that the occupants of the car were Youngblood and Love, the agents patted Love down and made a cursory search of both the car area where he was sitting and of Youngblood's purse. Agent Hill advised Love that he and

Youngblood could leave if they helped the officers determine that they were at the farm innocently and were not involved in the drug smuggling operation. However, the two appellants did not offer any explanation for their presence. Agent Pittard, aware that Love might be involved in the smuggling operation, advised his superior officers that Love had arrived at the farm. He was subsequently directed to detain Love and Youngblood until the agents in charge of the investigation arrived. Pittard did so and informed Love that agents would soon arrive to charge him with narcotics violations. Soon thereafter, Youngblood and Love asked for permission to use the restroom. Although Pittard told them they could enter the house, the appellants said they preferred to relieve themselves outdoors. Love went to a nearby tree while Youngblood went to some bushes several yards away. Some

twenty minutes later, Agents Stewart and Shumard arrived and placed the appellants under arrest. After his arrival, Agent Hill went to the bushes where Youngblood had gone and discovered several packages containing cocaine. In addition, he found several torn-up pieces of paper. Agent Pittard also found torn-up papers near the tree where Love had gone to relieve himself.

These papers included the telephone numbers of "Double R" and Lee. An examination of Youngblood's address book also revealed the telephone numbers and addresses for Rusty Corvette, Rivera, Tom and Joe Merolla (Southern Aero Traders), "Double R", Kenneth Davidson, Frank Kelly, "Leo", and Robert Lee. In addition, when Lee was arrested, he had Youngblood's Richmond Hill telephone number on a slip of paper. It was later determined that a collect call had been made from the pay phone at the Sumter

airport to Youngblood's home in Richmond Hill, Georgia, at 10:25 p.m. on December 20, 1982.

The Lee farm was searched pursuant to a search warrant on December 23, 1982. Found in the house were an aircraft radio transceiver, a "blue box" radio, two walkie-talkies, a hand-drawn map of the Carribbean and part of South America, and a book entitled "The Smuggling Business." A large antenna was also found on the house roof. In addition, six airplane seats were found stored in a truck behind the residence and several old tires were found in an outside storage area.

Because we believe the various issues presented for our consideration on this appeal have little merit, we will discuss each only briefly.

II.

Jury Instructions

Love, Youngblood and Lee attack the trial court's jury instructions on a number of grounds. We will address each in turn.

A. The doctrine of mere presence

The appellants first contend that the trial court's charge regarding the doctrine of mere presence unfairly focused on defendants Ruiz and Restrepo to the appellants' detriment.[7] We disagree. The district court was very careful to explain to the jury that a criminal defendant's mere presence at the scene of the crime or his knowledge of that crime is insufficient to establish that he joined a conspiracy or aided and abetted in the commission of the crime. Instead, the defendant's active, knowing participation is required before a conviction may be entered. See United States v. Weil, 561 F.2d 1109, 1112. (4th Cir. 1977).

At no time did the district court below suggest to the jury that the appellants could not be found to have been merely present at the scene of the crime and hence not guilty.[8] Although it might have been preferable for the trial court to have kept his instructions more broadly constructed, this aspect of the jury charge did not in any way prejudice the appellants by misleading or confusing the jury. See United States v. Moss, Bi, 83-5301, Slip Op. at 10-11 (4th Cir. March 7, 1985).

B. Intent

Appellants next contend that the trial court's instructions created a mandatory presumption with respect to the element of intent and thereby reduced the government's burden of proof below the constitutionally required "beyond all reasonable doubt" standard.[9] See In re Winship, 397 U.S. 358 (1970). The Supreme Court has consistently

condemned the use of conclusive presumptions regarding disputed elements of a partiacualr crime because "[t]o allow a reviewing court to perform the jury's function of evaluating the evidence . . . when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt area to be made." Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); see also Sandstrom v. Montana, 442 U.S. 510 (1979); Tweety v. Mitchell, 682 F.2d 461 (4th Cir. 1982), cert. denied, 460 U.S. 1013 (1983). Nevertheless, the instruction in this case did not "create a conclusive or burden shifting presumption on intent" in the manner of the instructions condemned in Sandstrom and Johnson. Instead, the charge merely instructed the jury as to what a

reasonable inference would be. The individual jurors were not required to draw any inference. Given the district court's explanation of both the element of intent and its instruction reflecting the government's need to prove all the elements of the alleged crimes, including intent, beyond all reasonable doubt, we believe the charge, taken as a whole, did not create a conclusive presumption regarding intent nor constitute reversible error. See United States v. Arthur, 544 F.2d 730 (4th Cir. 1976) ("An instruction that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his voluntary acts has generally been held proper.").

C. Credibility of Witnesses

The appellants next challenge that portion of the district court's charge relating to the credibility of witnesses.

Specifically, they object to the trial court's instruction that:

If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves."

This court has long held that the instruction that a witness is presumed or assumed to tell the truth is improper. See United States v. Safely, 408 F2d 603 (4th Cir.), cert. denied, 395 U.S. 983 (1969). We reiterated this point most recently in United States v. Varner, 748 F.2d 925 (4th Cir. 1984) in holding such an instruction to be erroneous and remanding that case for a new trial. In Varner, the defendant objected to the instruction at the trial below. In this case, however, no objection to this part of the charge was made. This failure to object precludes our review of the challenged instruction unless it

constitutes "plain error". In United States v. Safely, supra, we considered whether a "presumption of truthfulness" instruction such as the one tendered here constituted plain error. We held that it did not. Safely governs our disposition of this issue on appeal today. The trial court did not commit plain error by issuing this instruction.

D. Other challenged instructions

Appellants also contend that the district court's charge relating to the definition of reasonable doubt constituted plain error necessitating a reversal of their convictions.[10] We begin by noting that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury". Smith v. Bordenkircher, 718 F.2d 1273, 1276 (4th Cir. 1983), cert. denied, 104 S.Ct. 2355 (1984) (quoting Holland v. United States, 348 U.S. 121, 140 (1954).

As a result, this court has repeatedly joined "in the general condemnation of trial court attempts to define resonable doubt in their jury instructions." United States v. Moss, No. 83-5301, slip op. at 9. See also, e.g., Smith v. Bordenkircher, 718 F.2d at 1276; Whiteside v. Parke, 705 F.2d 869, 871 (6th Cir.), cert. denied, 104 S.Ct. 141 (7th Cir. 1982); Dunn v. Perrin, 570 F.2d 21, (1st Cir.), cert. denied, 437 U.S. 910 (1978). Nevertheless, we have recognized the "[m]ere attempts to defind reasonable doubt do not . . . constitute reversible error per se." Moss, supra, at 9. While we cannot endorse the district court's attempt to define reasonable doubt, we are satisfied that the instructions in this case were not plain error and do not require reversal of the appellants' convictions. In no way were the instructions "misleading or confusing"

and, viewed in the context of the charge as a whole, "correctly convey[ed] the concept of reasonable doubt." Id. Consequently, the challenged instructions regarding reasonable doubt are not sufficiently prejudical to warrant reversal.

In addition, appellants challenge the trial court's instruction that "If a Defendant be proven guilty, say so; if not proved guilty, say so." We conclude that this instruction does not consitute plain error in light of the district court's ameliorating instruction squarely placing the burden on the government to prove the defendant guilty of the crimes charged beyond all reasonable doubt. Finally, we are convinced that the district court's instructions regarding "attempt" and "aiding and abetting" are both accurate and clear and do not constitute plain

error requiring a reversal of the appellant's convictions.

III.

The Continuing Criminal Enterprise

Love attacks his conviction and resulting sentence under 21 U.S.C. § 848 on several grounds, none of which are ameritorious. In partiacular, Love argues that the district court's jury instruction regarding the continuing criminal enterprise count was improper. The challenged portion reads as follows: Thus you must find beyond a reasonable doubt that Defendant Love is guilty as charged in any of Counts 2, 3, 5, 6, 7, 8, 10, 11, 13, 14, 17 and 18, and that the conduct charged in any of these counts, <u>together with additinal violations of the drug laws</u>, constituted a total of three or more violations of the federal drug laws committed over a period of time with a single or similar purpose. This will constitute a finding

that the Defendant Love engaged in a continuing series of violations (A.142). (emphasis added)

Love argues that the use of the term "drug laws" enabled the jury to consider as predicate offenses under Section 848 crimes not included in that section, i.e., non-subchapter I or II offenses.[11] However, we believe that in the context of this charge the language "additional violations of the federal drug laws" referred to felony drug offenses not specifically charged as substantive counts but on which evidence had been presented. These offenses, plus the counts listed in the charge, all contemplated crimes under subchapter I or II and were the only offenses which could be considered in establishing the three violations necessary to support a continuing criminal enterprise conviction. Consequently, the district

court committed no error in giving this instruction.[12]

In addition, Love argues that he was improperly convicted and sentenced under both RICO and Section 848. We disagree. These statutes contemplate separate and distinct offenses which may be punished separately. See United Stataes v. Phillips, 664 F.2d 971, 1010-14 (5th Cir. 1981), cert. denied sub nom. Meinster v. United States, 457 U.S. 1136, sub nom. Platshorn v. United States, 459 U.S. 906 (1982).[13]

IV.

Multiplicitous Counts

The appellants argue that several counts in their indictment were improperly multiplicitous. We disagree. The Supreme Court has determined that conspiracies and the substantive offenses committed in the course of those conspiracies are separate offenses and may be charged separately. Callanan

v. U.S., 364 U.S. 587 (1960); Iannelli v. U.S., 420 U.S. 770 (1975). In this indictment, count 2 charged the appellants with conspiring to import and attempting to import controlled substances. Counts 7, 10, and 13 charged the appellants with attempting to import specific planeloads of controlled substances. The latter three counts are substantive offenses separate from the conspiracy count and may be charged independently under Callanan. Similarly, count 3 charged the appellants with conspiracy to possess and attempt to possess narcotics with the intent to distribute. Under Callanan, counts 8, 11, and 14 are specific substantive offenses charged separately from the overall conspiracy. These counts at issue are therefore not multiplicitous.

V.

Double Jeopardy

Youngblood and Lee were convicted on count 1 of conspiracy to violate the RICO statute, on count 2 of conspiracy to import drugs and on count 3 of conspiracy to possess drugs with the intent to distribute. They contend that all three conspiracies were "identical in goals, participants, time span and substantive crimes committed." Therefore, they assert that a conviction and sentencing for all three constitute multiple punishments for the same crime in violation of the double jeopardy clause of the Constitution. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969). We disagree.

Each conspiracy conviction involves an element of proof not required by the others. See United States v. Blockburger, 284 U.S. 299 (1932). A conviction for conspiracy to import does not require proof of conspiracy to possess and distribute. Neither proof

of importation nor possession is required for a RICO conviction. In addition, these RICO convictions included armed robberies and Travel Act violations as predicate offenses. Neither set of these offenses were elements of proof for the narcotics violations.

Separate offenses involving the same or similar acts which violate different statutes may be charged and sentenced separately and consecutively. See United States v. Albernaz. 450 U.S. 333 (1981). Where a RICO conspiracy overlaps with other conspiracies, separate convictions and sentences may be imposed for both conspiracies. See United States v. Phillips, 664 F2d at 1010-1014. Consequently, we find no error in the conviction and sentencing of the appellants on counts 1, 2, and 3.

VI.

Constitutionality of Warrantless Arrest

Love and Youngblood argue that their arrest was constitutionally defective because they were arrested without a warrant. This argument is without merit. Based on the "totality of the circumstances," the government agents had valid probable cause to be stationed on Lee's premises. See Illinois v. Gates, 462 U.S. 213 (1983). In addition, the exigencies of the circumstances surrounding the appellants' apprehension necessitated a warrantless arrest. Cf. Payton v. New York, 445 U.S. 573 (1980) (absent exitent circumstances, an arrest in the home or curtilage area around the home must be accomplished by means of an arrest warrant.) Here, agents were properly stationed to apprehend those suspects who might surface at the primary landing site.

VII.

Other Alleged Trial Errors

A. Testimony of Agent Hill

The appellants contend that a mistrial should have been ordered after Agent Hill testified that Love and Youngblood made no effort to explain their presence at the Lee farm on the night of their arrest. We agree with the district court that a mistrial was not warranted. The Supreme Court held in Doyle v. Ohio, 426 u.S. 610 (1976) that testimony concerning a defendant's silence "at the time of arrest and after receiving Miranda warnings" is inadmissible. However, the Court has subsequently refined its rule in Doyle to permit testimony concerning a defendant's silence where the defendant has not "received any Miranda warnings during the period in which he remained silent immediately after his arrest." Fletcher v. Weir, 455 U.S. 603 (1982), cert. denied, 103 S.Ct. 2111 (1983). In this case neither Love nor Youngblood

had been given any Miranda warnings at the time Agent Hill observed their silence. As a result, under Doyle and Fletcher, Agent Hill's testimony was properly admitted.

B. The Testimony of Agent Shumard

The appellants argue that DEA Agent Shumard's testimony concerning informatiaon he received from a fellow DEA agent in Florida about proposed landing sites in South Carolina is inadmissible hearsay. We find this argument unpersuasive.

Fed. R. Evid. 801(c) defines an out of court statement as hearsay if it is "offered in evidence to prove the truth of the matter asserted." However, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. United States v. Scott, 678 F.2d 606, 612 (5th Cir.), cert. denied, 459 U.S. 972

(1982); see also United States v. Hunt, 749 F.2d 1078, 1084 (4th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3703 (U.S. March 6, 1985) (No. 84-1481). In this case, Shumard's testimony was offered not for its truth but only to explain why the officers and agents made the preparations that they did in anticipation of the appellants' arrest. As such, it was not inadmissible hearsay. See United States v. Mancillas, 580 F.2d 1301 (7th Cir.), cert. denied, 439 U.S. 958 (1978) ("Whether or not the . . . statement was true, the fact that it was made would surely explain the flurry of investigative activity in three states the jury was soon to hear about. For this purpose, outlining the background of the investigation with the evidence not being offered to prove its truth, it could be said not to be nonadmissible as hearsay." (citations omitted)).

C. The Telex

On December 17, 1982, the DEA office in Miami sent a telex to the DEA office in Columbia, South Carolina relating information it had received concerning this investigation. The sources of the information are not indicated in the telex. In brief, the telex stated that Leo Rosquette, a DEA fugitive, was planning to smuggle 900 pounds of cocaine by aircraft to an airfield controlled by Love near Columbia, South Carolina. The plane to be used was N3234D, then located at Southern Aero Traders in Opa Locka, Florida. The telex indicated that the plane was having long-range fuel tanks installed and would be ready to fly to South America on December 19, 1982. The telex also stated that Garrett Clark, another DEA fugitive was tentatively scheduled to be the pilot.

Lee contends that the district court's refusal to both admit the telex

in evidence and allow full cross-examination concerning its contents was reversible error. We disagree. Regardless of the propriety of the trial court's decision, the error, if any, can only be considered harmless given the overwhelming evidence in the record implicating Lee and contradicting the "tentative" identification of Clark as the pilot in the telex.[14]

D. The Voice Spectrogram

As part of his defense at trial, Lee introduced the testimony of a voice identification expert, Dr. Henry Truby. Dr. Truby testified concerning spectrographic voice analyses he made comparing the tape recording of the pilot's voice with Lee's voice. Lee now argues on appeal that the trial court impermissibly commented to the jury on the credibility of this witness.

A Federal district court has long had the authority to comment on the evidence introduced at trial. See Quercia v. United States, 289 U.S. 466 (1933). Such comments are permitted "to assist the jury in arriving at a just conclusion." Anderson v. Warden, Maryland Penitentiary, 696 F.2d 296, 299 (4th Cir. 1982), cert. denied, 103 S.Ct. 2463 (1983). As a result, we have held that "the judge's comments must be neutral and [are] not [to] be given so as to intimidate the witnesses or otherwise interfere with the ascertainment of truth." Id. at 299. A thorough review of this record has not uncovered any statements by the trial court which undermine his neutraility.[15] His charge to the jury concerning the voice spectrogram was fair if not totally neutral.[16] Therefore, the district court's comments regarding the

voice spectrogram did not constitute reversible error.

E. Remaining Issues

Without discussing each allegation of error, we conclude after having carefully reviewed the record and the briefs that none of the appellants' remaining asserted trial errors are sufficiently meritorious to warrant reversal.

VIII.

CONCLUSION

Considering the complexity of this prosecution, a prosecution involving a two-week jury trial, testimony from 80 government witnesses and the introduction of 150 exhibits, we find particularly appropriate Judge Johnson's concluding remark in Phillips, and adopt them as equally applicable to the facts of this case:

As all experienced trial and appellate judges know, it is virtually

impossible to conduct a trial free of some technical errors. This is particularly true in lengthy trials involving multiple defendants and attorneys, and numerous complex substantive and procedural problems. However, a defendant is entitled only to a fair trial, not a perfect one. We are convinced after careful and exhaustive review of the record that each of the defendants received a fair trial. (citations omitted)

664 F.2d at 1044.

For the foregoing reasons, the appellants' convictions are

AFFIRMED.

1 The three appellants were convicted of engaging in an enterprise conducting a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961 (Count 1); conspiracy to import and conspiracy to possess marijuana and cocaine with intent to

distribute in violation of 21 U.S.C. §§ 952(a), 960, 963 and 18 U.S.C. § 2 (Counts 13 and 17); and two counts of attempted possession of marijuana and cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a) (1), 846 and 18 U.S.C. § 2 (Counts 14 and 18).

2 Love and Youngblood were convicted of two counts of importation of marijuana in violation of 21 U.S.C. §§ 952(a) possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a) (1), 846 and 18 U.S.C. § 2 (Counts 6 and in violation of 21 U.S.C. §§ 952(a), 960, 963 and 18 U.S.C. § 2 (Count 10); an additional count of attempted possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a) (1), 846 and 18 U.S.C. § 2 (Count 11); and transportation of a stolen aircraft in interstate commerce in violation of 18 U.S.C. §§ 2312, 2 (Count 12). In addition, Love was convicted of two separate counts (Counts 4 and 9) and Youngblood of one single count (Count 16) of traveling or causing others to travel in interstate commerce with the intent to facilitate the importation and possession of controlled substances with intent to distribute in violation of 18 U.S.C. § 1952(a) (3).

3 Count 19.

4 Love was acquitted of Count 15 (obstruction of justice); Lee was found not guilty of Counts 10 and 11 (attempting to import and attempting to possess 1600 pounds of marijuana with intent to distribute); a directed verdict was entered as to Youngblood on Count 19 (Continuing Criminal Enterprise); and co-defendants Ruiz and Restrepo were acquitted on all charges.

5 Love was sentenced to 50 years imprisonment on Count 19 (CCE), 20 years imprisonment on Count 1 (RICO) to run consecutively to the term in Count 19, and 5 years imprisonment on Count 12 (transporting stolen aircraft in interstate commerce) to run concurrently with the other sentences imposed, for a total sentence of 70 years imprisonment. Love was not sentenced on any of the drug conspiracy or substantive counts because of the sentence imposed on the continuing criminal enterprise charge.

Youngblood was sentenced to 20 years imprisonment on Count 1 (RICO), 15 years imprisonment on Count 2 to run consecutively to the sentence in Count 1, 15 years imprisonment on Count 3 to run concurrently with the sentence imposed in Count 1, and 5 years imprisonment on each of Counts 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17 and 18, to run concurrently with the other sentences imposed, for a total sentence of 35 years imprisonment. Youngblood also received a sepecial parole term of 3 years.

Lee was sentenced to 20 years imprisonment on Count 1 (RICO), 15 years imprisonment on each of Counts 2 and 3 to run concurrently with the sentence in Count 1, and 5 years imprisonment and a special parole term of 25 years on each of Counts 13, 16, 17 and 18, to run concurrently with each other but consecutively to the sentence imposed in Count 1, for total sentence of 25 years.

6 Youngblood received diamond earrings stolen in the robbery of Paul Shuping on July 31, 1982.

7 The trial court gave the following instruction regarding "mere presence":

I would instruct you that mere presence at or near the scene of a crime, or where a crime was supposed to be committed, is insufficient to establish that a defendant joined a conspiracy or aided and abetted in the commission of the crime. If you should find that Ruiz and Restrepo were not willfully part of the conspiracy, or that they were -- and that they were merely present near where the crime was committed then it would be your duty to find them not guilty.

8 In addition to the "mere presence" instruction in footnote 7, the trial court also instructed that:

Mere association between a principal and the accused of aiding and abetting is not sufficient to establish guilt, nor is mere presence at or near the scene, or even knowledge that the crime was being committed, sufficient, standing by itself, to establish aiding and abetting. Neither can a person be found guilty of aiding and abetting a crime that has already been fully committed. However, a defendant who willfully joined in the commission of an offense before its full completion may be found guilty as an aider and abettor.

Additionally, the trial court fully instructed the jury that each element of each crime must be proven beyond all reasonable doubt and that each defendant must have been an active, willful participant in the wrongdoing in order for guilt to be established.

9 The appellants challenge the trial court's instruction that:

"Now you must consider its [sic] reasonable to draw the inference and find that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. You may draw the inference that a Defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge would reasonably have expected to result from any intentional act or conscious omission."

10 In particular, the appellants object to that part of the trial court's charge instructing that reasonable doubt

exists in any case when after a careful and impartial consideration of all the evidence, you the jury does [sic] not feel convinced to a reasonable moral certainty that a Defendant is guilty of the charges.

In addition, the appellants challenge the instruction that:

Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important affairs of your own life.

11 21 U.S.C. § 848(b) reads as follows:

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter

--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

12 Love contends that the offenses alleged in counts 4 and 9, i.e. traveling in interstate commerce and engaging others to travel in interstate commerce with the intent of carrying on and facilitating the possession with intent to distribute of controlled substances, were impermissibly considered by the jury in its deliberation regarding the continued criminal enterprise charge since they are offenses under Title 18, not subchapter I or II of Title 21. However, since the trial court specifically omitted these counts in his instruction to the jury on count 19, it is unreasonable to conclude that the term "drug laws" could then be understood to re-include those counts.

13 We agree with the Fifth Circuit's reasoning in Phillips, 664 F.2d at 1013-14:

We conclude that the RICO counts are not lesser included offenses of the § 848 count. Both the substantive RICO and RICO conspiracy counts require proof of facts and elements not required to be proved under § 848, even though there is a substantial overlap in the proof offered to establish the crimes. In a

substantive or conspiracy RICO prosection the Government must prove the existence of an enterprise that affects interstate commerce. The existence of an enterprise is an element that is separate from the element of the pattern of racketeering activity in which the enterprise engages; the enterprise is proved by evidence of a continuing organization and by evidence that the members function as a continuing unit. United States v. Turkette, supra, 101 S.Ct. at 2528. Mere proof of a pattern of racketeering activity, i.e., commission of at least two acts of racketeering activity, is not sufficient to establish a RICO violation; there must also be proof of the existence of the enterprise itself. Section 848, by contrast, does not require proof of a RICO type enterprise. Rather § 848 merely requires proof that the defendant undertook a continuing series of violations in concert or in conspiracy with five or more persons.

Proof of a § 848 conspiracy does not establish proof of every fact and element necessary to show a RICO conspiracy violation. The object of a RICO conspiracy, as this Court stated in United States v. Elliott, [571 F.2d 880, 902], is to violate a substantive RICO provision, not merely to commit each of the predicate crimes constituting a patternof racketeering activity. The gist of a RICO offense is that the defendant furthered a racketeering enterprise through a pattern of racketeering activity; a RICO count charges not the commission of the predicate crimes but rather the furthering of the enterprise. United States v. Bright, [630 F.2d 804, 813]. The object of a § 848 conspiracy could be merely to commit the particular

narcotics violations which taken cumulatively constitute a continuing series of violations.

14 The evidence implicating Lee included the following:

1) Lee was identified as the pilot flying the plane (i.e. N3234D) from Opa Locka on December 19, 1982 North toward New Smyrna Beach; 2) Lee was identified as he sat on the patio at the airport ten minutes after the plane landed at New Smyrna Beach; 3) Lee was identified paying cash for the 40-45 gallons of fuel used to refuel the plane; 4) Lee's voice was identified as that of the pilot of N3234D on the night of December 20, 1982 by two law enforcement officers who had known Lee for 20 and 10 years repectively; 5) Lee was arrested on an access road at Sumter County airport that same night; 6) Lee was unshaven, exhausted and reeked of chemicals associated with cocaine at the time of his arrest; 7) the police found two letters addressed to Lee from his attorney, a monogrammed shirt with the initials "REL", a thermos bottle with Lee's fingerprints, aeronautical charts with Lee's handwriting and flight plans for Monteria, South America and Riohacha, South America to South Carolina inside the airplane with the duffel bags containing 955.1 pounds of cocaine; and 8) Garrett Clark was never mentioined as a participant in the activities of December 19-20, 1982.

15 Even if we assume the district court did make tendentious comments at the time the expert was called, he corrected his error with an immediate ameliorating instruction:

I'm not expressing any opinion as to -- of my own. Of course if I did express an opinion, you would be influenced in any degree by it because it's up to you. But I am going to let him testify as what we consider an expert witness. (Tr. 13-239, 13-240).

See U. S. v. Billups, 692 F.2d 320, 327 (4th Cir. 1982), cert. denied, 104 S.Ct. 84 (1983). (No error where "judge's curative instructions served to assist the jury in giving proper weight to his comments.")

16 The trial court instructed the jury as follows:

Now you will recall that a voice spectrogram was admitted into evidence. I charge you that the spectrogram was only a basis for the voice identification expert's opinion and you may disregard his testimony if you should conclude that his opinion was not based on adequate education, training or experience, or that his professed science or voice print identification was not sufficiently reliable, accurate, and dependable.

Depending upon your view of the evidence, you are not obligated to accept the opinion of the voice identification expert if you do conclude the reasons supporting that opinion are not sound, or if contradictory evidence casts doubt upon it, or if you conclude that the methods used by the expert are not scientifically acceptable.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT
NO. 84-5262

United States of America,

Appellee,

vs.

Robert Edward Lee,

Appellant.

Appeal from the United States District Court for the District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

_____
CLERK

Petition for Rehearing
Filed 7/17/85
Denied 7/29/85

0 172030Z DEC 82
FM: DEA MIAMI FLO DIV OFC
DEA HQS WASHDC
DEA ATLANTA DIV OFC
DEA COLUMBIA RO
DEA ORLANDO RO
DEA EL PASO INTEL CTR

BT
DBA SENSITIVE MIAMI 01985

ATTN: OC
ATTN: PLS PASS TO BOGOTA CO

SUBJ: LEONARDO ROSQUETTE
GFG1-83-4008/DA1CO

INFORMATION HAS BEEN RECEIVED THAT DEA FUGITIVE LEONARDO POSQUETTE, NADDIS 3433, IS PART OF A GRP PLANNING TO SMUGGLE 900 LBS COCAINE VIA PRIVATE AIRCRAFT INTO THE AREA OF COLUMBIA, SC. THE GRP HAS OBTAINED A CESSNA 404 TITAL AC FROM MIAMI AREA FIRM, SOUTHERN AERO TRADERS, NADDIS 848490 AND 127817, FOR THIS TRIP. THE AC N-3234D IS CURRENTLY LOCATED AT OPA LOCKA AIRPORT HAVING WING LOCKER TANKS INSTALLED. THE INSTALLATION OF THESE FUEL TANKS SHOULD BE COMPLETED BY 12/19/82 AND POSQUETE ANTICIPATES THAT THE AC WILL DEPART IMMEDIATELY. THE PILOT OF THE AC HAS BEEN TENTIVELY ID AS GARRETT CLARK NADDIS 520757, WHO IS ALSO A DEA FUGITIVE. CLARK WILL ALLEGEDLY BE PAID 180,000 DLRS FOR THE TRIP.

AFTER DEPARTURE FROM OPA LOCKA THE AC WILL FLY NON-STOP TO COLOMBIA, LOCATION UNKNOWN, BE LOADED WITH COCAINE AND RETURN NON-STOP TO AN AIRSTRIP IN THE VICINITY OF COLUMBIA, SC WHICH IS CONTROLLED BY NEWBY FRANKLIN LOVE, NADDIS 786417. LOVE IS RESCEIVING 100,000 DLRS FOR THE USE OF THIS STRIP WHICH IS BELIEVED TO BE ON PROPERTY

OWNED OR CONTROLLED BY LOVE AND KNOWN TO COLUMBIA, SC PD.

AC N-3234D IS DESCRIBED AS A CESSNA 404 TITAN, 1977 MODEL, BURGUNDY TOP, WHITE BOTTOM, AND BROWN AND ORANGE STRIPES RUNNING LENGTH OF FUSELAGE. MINIMALLY US CUSTOMS SUPPLIED ELECTRONIC TRACKING DEVICE COMPATIBLE WITH CUSTOMS RECEIVERS WILL BE INSTALLED ON AC. IF APPROPRIATE REPLACEMENT TRANSPONDER CAN BE LOCATED IT WILL ALSO BE PLACED ON AC. SMUGGLING GRP ALLEDEDLY HAS ACCESS TO RF DETECTION DEVICES AND RAMP TESTERS IN COLOMBIA, SA WHICH WILL BE USED TO DE-BUG AC. OFF-LOAD CREW IN COLUMBIA, SC ALLEDGEDLY HAVE ACCESS TO AND UTILIZE NIGHT VISION DEVICES, MOBILE RADIOS, AND AUTOMATIC WEAPONS.

EPIC WILL BE TELEPHONICALLY NOTIFIED OF ANY TRACKING DEVICES PLACE ON AC. IT IS REQUESTED THAT EPIC NOT PLACE THIS AC ON FAA LOOKOUT AT THIS TIME. COLUMBIA PD WILL BE NOTIFIED TELEPHONICALLY OF AC'S DEPARTURE FROM OPA LOCKA.

ANY QUESTIONS CONCERNING THE ABOVE SHOULD BE DIRECTED TO MFD ATTN CA SPENCE OF GS ARNTZ, DIG, FTS 820-4917 OR COMM 305-591-4917.

RECONTROL UPON RECEIPT BY DEA ONLY.

PETER F. GRUDEN
SAO
BT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA
COLUMBIA DIVISION

United States of America vs. Newby Franklin Love, Robert Edward Lee, Sue Robinson Youngblood, Luis Alfonso Gonzales-Fuentes, Hernan DeJesus Restropo, and Juan Carlos Ruiz, Defendants.	CRIMINAL NO. 83-20 DEFENDANT LEE'S MOTION TO COMPEL DISCLOSURE OF IDENTITY OF INFORMER

TO: CAMERON B. LITTLEJOHN, JR., ASSISTANT UNITED STATES ATTORNEY:

Defendant, Robert Edward Lee, moves the Court for and Order compelling the Government to disclose to the defense the identity (or identities) of any government informer who was an active participant in the illegal activity charged in this cause.

This motion is grounded upon the informed belief that there was such an

informer (or informers) and the fact that such disclosure is relevant and helpful to the defense and essential to a fair determination of this case. Attached is a memorandum in support of this motion.

Respectfully submitted,

THOMAS P. SIMPSON OF
COUNSEL

KING, VERNON & GAMBRIEL,
P.A.
1426 Richland Street
Columbia, South Carolina
29201
(803) 779-3090

COUNSEL FOR DEFENDANT,
ROBERT EDWARD LEE

Columbia, South Carolina
February 8, 1983.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF COLUMBIA
COLUMBIA DIVISION

United States of America,	CRIMINAL NO. 83-20
vs.	MEMORANDUM IN SUPPORT OF DEFENDANT LEE'S MOTION TO COMPEL DISCLOSURE OF IDENTITY OF INFORMERS
Newby Franklin Love, Robert Edward Lee, Sue Robinson Youngblood, Luis Alfonso Gonzales-Fuentes, Hernan DeJesus Restrepo, and Juan Carlos Ruiz,	
Defendants.	

TO: CAMERON B. LITTLEJOHN, JR.,
ASSISTANT UNITED STATES ATTORNEY:

I. STATEMENT OF THE CASE

Defendant, Robert Edward Lee, is charged, with other Defendants, in a four count indictment with conspiracy to violate Sections 952(a), 960 and 963 of Title 21, United States Code and with committing the substantive offenses thereunder. It is alleged generally that he was part of a conspiracy to import quantities of cocaine into The United States.

From the affidavit of Norman C. Shummard, Special Agent, Drug Enforcement Administration, dated December 21, 1982, and filed with the United States Magistrate as a basis for the Complaint and Warrant it is obvious that confidential informants were used in the investigation of this case.

For this reason, Defendant, Lee, requests firt, under Brady v. Maryland, 373 U.S. 83 (1963), that the Government be ordered to disclose whther one of the participants in the alleged conspiracy was an informant and, second, that the identity (or identities) of such informer (or informers) be ordered disclosed to said Defendant.

The instant memorandum addresses the points and authorities pertinent to that second request.

II. DISCUSSION

The leading case on disclosure of an informant's identity for over twenty

(20) years has been that of Rovario v. United States, 353 U.S. 53 (1957). In that decision, the Supreme Court of the United States recognized the ". . . Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law," id. at 59, but at the same time set limits on the scope of that privilege. These limits are imposed by the underlying purpose of the privilege, described as the preservation of anonymity to encourage citizens to perform their obligation to communicate their knowledge of the commission of crimes to law enforcement officials. Id.

Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity

of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of the informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause, the privilege must give way.

Id. at 60-61.

The Court went on to hold that a "fixed rule" with respect to disclosure was not justifiable and opted for a balancing test, weighing the public interest in protecting the flow of

information against the accused's right to prepare his defense.

Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances in each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Id. at 62.

Subsequent decisions have emphasized the importance, in this balance, of the role played by the informer in the offense for which the Defendant was charged, Rugendorf v. United States, 376 U.S. 528 (1964); United States v. Whiting, 311 F.2d 191 (4th Cir. 1962); United States v. Pitt, 382 F. 2d 322 (4th Cir. 1967); and this

Circuit has recognized a distinction between a mere "tipster" and a participant informer, holding that:

> . . . where the informant is an actual paricipant, and thus a witness to material and relevant events, fundamental fairness dictates that the accused have access to him as a potential witness.

McLawholrn v. States of North Carolina, 484 F.2d 1 (4th Cir. 1973). Moreover, the Court held that where the informer was a participant, and thus qualified as a material witness, the accused was not required to present proof of a need for the informant's testimony. Id.

The foregoing principles clearly govern the motion at bar and, under the Roviaro balancing test, compel the conclusion that disclosure herein is required.

Accordingly, it is respectfully submitted that the Defendant's Motion to Compel Disclosure must be granted.

Respectfully submitted,

THOMAS P. SIMPSON OF COUNSEL

KING, VERNON & GAMBRELL, P.A.
1426 Richland Street
Columbia, South Carolina 29201
(803) 779-3090

COUNSEL FOR DEFENDANT,
ROBERT EDWARD LEE

Columbia, South Carolina

Feb. 8, 1983.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA,	)	CR. NO. 83-20 and CR. NO. 83-22
vs.	)	MEMORANDUM IN OPPOSITION TO DEFENDANT LEE'S MOTION TO COMPEL DISCLOSURE OF IDENTITY OF INFORMERS
NEWBY FRANKLIN LOVE, ET AL.,	)	
Defendants.	)	

The defendant, LEE, has moved this honorable Court for an Order compelling the Government to disclose in advance of trial the identities of certain informants used during the course of this investigation.

Counsel for the defendant has relied primarily on the decisions in Roviaro v. United States, 353 U.S. 53 (1957), and McLawhorn v. State of North Carolina, 484 F.2d 1 (4th Cir. 1973), in support of his position. He has also pointed to the distinction between the government's duty of disclosure where a

participating informant is involved, as opposed to a mere "tipster."

In this case, evidence was presented at the preliminary examination concerning information supplied by government informants. At that time the Government, through counsel, stated that it was our intention to call these participating informants as witnesses during the trial of this case. It is still the government's intention to take every step to insure the presence of these witnesses as discussed in United States v. Hargrove, 647, F.2d 411 (4th Cir. 1981). (Emphasis supplied)

The Roviaro and McLawhorn decisions contemplate situations where the government seeks to protect the identities of participating informants throughout the trial and beyond. This is not the situation here.

The Government would submit that for security reasons, the identities of

paricipating informants should be protected until they are to testify. This is apparently the situation contemplated by Title 18, United States Code, Section 3500 and F.R.Cr.P. 26.2, in that statements are not subject to disclosure until after a witness has testified on direct.

For the above reasons, the Government would oppose the immediate disclosure of the identities of participating informants.

Respectfully submitted,

HENRY DARGAN McMASTER
UNITED STATES ATTORNEY

BY: _____
CAMERON B. LITTLEJOHN, JR.
ASSISTANT U.S. ATTORNEY

March 28, 1983
Columbia, S. C.

MR. SIMPSON: YOUR HONOR, IF THE GOVERNMENT IS NOT GOING TO STIPULATE, ALL I CAN DO IS RENEW MY MOTION FOR SEVERANCE AND PROTECT MYSELF IN THE RECORD, YOUR HONOR.

THE COURT: I UNDERSTAND THAT, AND I FRANKLY WOULD BE INCLINED TO GRANT A SEVERANCE IF THE WITNESS WERE AVAILABLE BUT THERE IS NO SUCH WITNESS AVAILABLE.

MR. SIMPSON: YOUR HONOR, IN THAT CONNECTION, WE WERE ADVISED AT THE CONFERENCE THE OTHER DAY THAT THEY WERE CONTACTING -- THE UNITED STATES ATTORNEY'S OFFICE WAS CONTACTED BY AN ATTORNEY FROM WASHINGTON AND WAS REQUESTED TO WITHDRAW THE SUBPOENA THEY HAD ISSUED FOR MR. MEROLA, THAT HE WAS OUT OF THE COUNTRY. WE HAVEN'T HAD AN OPPORTUNITY, YOUR HONOR, TO ATTEMPT TO FIND HIM.

I HAVE BEEN CONSIDERING THIS MATTER ABOUT THE AUTHOR OF THE TELETYPE THAT WAS SENT IN, AND MR. SLATTERY MADE THE STATEMENT THAT THE GOVERNMENT, THE F.B.I., THE D.E.A., EVERYONE HAD BEEN TRYING TO LOCATE THIS PERSON AND HAD BEEN UNDABLE TO DO SO, BUT YOU NEVER DID IDENTIFY HIM. IT MAY BE THAT MR. SIMPSON OR SOME OF CONFEREES FEEL THEY CAN DO A BETTER JOB OF LOCATING HIM THAN THE F.B.I., D.E.A., OR THOSE -- SO I REALLY THINK YOU OUGHT OT IDENTIFY --

MR. SLATTERY: HIS NAME CAME OUT ON THE STAND.

THE COURT: WELL, I DON'T KNOW, I WOULDN'T RECOGNIZE IT, BUT I'M JUST SAYING, I THINK YOU OUGHT TO --

MR. SLATTERY: IT IS JOE MEROLA.

THE COURT: -- IDENTIFY HIM AND TELL HIM WHAT INFORMATION YOU DO HAVE ABOUT HIM OR VERIFY HIS LAST KNOWN ADDRESS OR WHERE HE WAS LAST LOCATED.

MR. LITTLEJOHN: YOUR HONOR, WE HAVE JUST TOLD MR. SIMPSON THE TRUE NAME OF THE INFORMANT.

MR. SIMPSON: YOUR HONOR, WE DON'T WANT TO WAIVE. WE WOULD LIKE THE RECORD TO REFLECT THEY HAVE TOLD US, 10:37, ON MAY THE 2ND. WE DON'T WANT TO WAIVE ANY OF OUR OBJECTIONS.

Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH

Nos. 85-526 and 85-576

In the Supreme Court of the United States

OCTOBER TERM, 1985

NEWBY FRANKLIN LOVE AND
SUE ROBINSON YOUNGBLOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT EDWARD LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the jury instructions on intent, proof beyond a reasonable doubt, the credibility of witnesses, and the "mere presence" doctrine constituted reversible error (No. 85-526).

2. Whether petitioner was denied a fair trial by the prosecutor's disclosure of the identity of a confidential government informant shortly before the close of the government's case-in-chief where the informant was unavailable to and did not in fact testify at trial (No. 85-576).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-526

NEWBY FRANKLIN LOVE AND
SUE ROBINSON YOUNGBLOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 85-576

ROBERT EDWARD LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 767 F.2d 1052.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 85-526.

JURISDICTION

The judgment of the court of appeals in both cases, which were consolidated in that court, was entered on July 3, 1985. A petition for rehearing was denied on July 29, 1985 (Pet. App. 28a). The petition for a writ of certiorari in No. 85-526 was filed on September 25, 1985. The petition for a writ of certiorari in No. 85-576 was filed on September 30, 1985, and therefore is three days out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962, and a variety of violations of the federal narcotics laws, 21 U.S.C. 842(a)(1), 846, 952(a), 960 and 963. Pet. App. 3a & nn.1-2. Petitioners Love and Youngblood were also convicted of violating the Travel Act, 18 U.S.C. 1952(a)(3), and transporting a stolen aircraft in interstate commerce, in violation of 18 U.S.C. 2313. Finally, petitioner Love was also convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner Love was sentenced to a total of 70 years' imprisonment. Petitioner Youngblood was sentenced to a total of 35 years' imprisonment and three years' special parole. Petitioner Lee was sentenced to a total of 25 years' imprisonment and a special parole term of 25 years. Pet. App. 3a-4a & nn.1-2, 5. The court of appeals affirmed (Pet. App. 1a-26a).

1. The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals (Pet. App. 5a-11a). It showed that petitioners Love and Youngblood began to engage in interstate drug trafficking in 1980 and 1981, that they branched out into armed robberies in 1982, and that they continued to traffic in

cocaine that year. They also attempted to smuggle marijuana and cocaine from Colombia into this country. Petitioner Lee served as the pilot on a smuggling venture in December 1982. Pet. App. 5a-6a, 9a. In 1982, Youngblood and Love formed a drug trafficking partnership. Youngblood supplied cocaine that she transported from Florida to South Carolina, and Love then sold this cocaine to area drug dealers. Love also directed two of his associates to rob competing drug dealers and other persons whom Love believed would be unlikely to report the crimes to the police. Love furnished the weapons and vehicles that were used in the robberies and afterwards received the proceeds. Youngblood also received some stolen jewelry from one robbery. Lee was not involved in these crimes. Pet. App. 5a-6a.

During the latter half of 1982, Love and Youngblood attempted to smuggle marijuana and cocaine by airplane directly from Colombia, South America, to South Carolina, but they were unsuccessful on three different occasions. In November 1982, Love contacted Joseph Merolla, the owner of an airplane leasing service, and Frank Kelly, a Florida airport employee, for assistance in finding qualified pilots. Unbeknownst to Love, however, both Merolla and Kelly were informants for the Drug Enforcement Administration (DEA). When Love and Youngblood were unsuccessful in finding a qualified pilot, Kelly agreed to pilot the transport plane, and petitioner Lee was selected as Kelly's co-pilot. Lee and Kelly left for South America, but their trip was aborted when Kelly deliberately caused the plane to develop engine trouble. The scheme eventually failed when the aircraft, piloted by others, blew up after its takeoff in Colombia. Pet. App. 6a-9a.

Despite this setback, Love and Youngblood planned another smuggling venture. In early December 1982, Merolla informed the DEA that Love and others were planning to smuggle 700-800 pounds of cocaine from Colombia to

South Carolina around December 20. Merolla, who was responsible for equipping the transport plane with long range fuel tanks, installed an electronic beeper on the plane to enable the DEA to track its route. On December 19, Lee piloted the airplane to South America. Federal and state agents began surveillance of Lee's farm, the suspected primary landing site, as well as nearby airports in Sumter County, South Carolina. At roughly 9:00 p.m. that evening, the pilot of the transport plane requested clearance to land at the Sumter County Airport. Two men who knew Lee identified him as the pilot. After the plane landed, the agents sealed off the airport and searched the plane. They discovered 955 pounds of cocaine on board, two letters addressed to Lee from his attorney, a monogrammed shirt with Lee's initials, a thermos bottle containing Lee's fingerprints, and aeronautical charts in Lee's handwriting. The agents also stopped a pickup truck on an access road at the end of the runway; Lee was the driver. He appeared exhausted and reeked of chemicals. When arrested, Lee had Youngblood's telephone number on a slip of paper. Pet. App. 9a-10a.

Later that night, around 2:15 a.m., Youngblood and Love went to Lee's farm, where they were arrested. Both were later allowed to relieve themselves outdoors near the house. Agents later discovered several packages of cocaine and some torn-up papers in that area. The papers included the telephone numbers of Lee and another co-conspirator. Pet. App. 10a-11a.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-26a). It rejected their challenges to the district court's jury instructions on the ground that the instructions explaining reasonable doubt and credibility of witnesses did not constitute plain error when considered in light of the entire charge (*id.* at 14a-16a). The court also found that the instructions on intent did not impermissibly shift the

burden of proof to petitioners because the jury was not required to draw any inference of intent (*id.* at 13a-14a). The court also held that the instructions on the "mere presence doctrine" were not misleading or confusing (*id.* at 12a-13a). Finally, the court summarily rejected petitioner Lee's claim that the government's allegedly untimely disclosure of a confidential informant's identity denied him a fair trial (*id.* at 25a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

1. Petitioners Love and Youngblood argue (85-576 Pet. 7-13) that the district court's instructions on intent, proof beyond a reasonable doubt, the credibility of witnesses, and the "mere presence" doctrine were prejudicially erroneous. However, most of petitioners' claims were not properly preserved for review. Petitioner Love did not object to any of these instructions (C.A. App. 157), and petitioner Youngblood objected only to the "mere presence" charge (*id.* at 159-160). Aside from that exception, petitioners' challenges to the district court's jury charge can be sustained only if the instructions amounted to plain error. See, *e.g., United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 12-14; *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Under this standard, and given the overwhelming proof of petitioners' guilt, which they themselves appear to acknowledge (see 85-526 Pet. 3-6), the court of appeals correctly rejected petitioners' claims.

a. Petitioners contend (85-526 Pet. 7-8) that one of the district court's instructions on intent contained a mandatory presumption that shifted the burden of proof from the government to them, in violation of *Francis* v. *Franklin*,

No. 83-1590 (Apr. 29, 1985), and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).[2] That claim lacks merit.

To begin with, the instructions given here are materially different from those given in *Francis* and *Sandstrom*. In *Francis*, the instructions stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will" and that "[a] person [] of sound mind [] and discretion is presumed to intend the natural and probable consequences of his acts" (slip op. 8). Similary, in *Sandstrom* the instruction said that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" (442 U.S. at 515). In each case, the instruction directed the jury to presume an essential element of the charged offense. By contrast, the instructions here told the jury only to "consider it reasonable" to infer that a person ordinarily intends the natural and probable consequences of his acts and did not tell the jury that it must draw that inference (C.A. App. 145); indeed, in the very next sentence the district court expressly told the jury that it "may draw the inference" (*ibid.*). As the court of appeals correctly noted (Pet. App. 14a), "the charge merely instructed the jury as to what a reasonable inference would be. The individual jurors were not required to draw any inference." Moreover, the instruction here also differed from those in *Francis* and *Sandstrom* in that the inference was to be drawn only from those acts that were "knowingly done or knowingly omitted" (C.A. App. 145). The instructions here therefore did not shift the burden of proving intent from the government to the defendant. See, *e.g.*, *United States* v. *Johnson*, 756 F.2d 453, 454-455 (6th Cir.

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[2]That charge was as follows (C.A. App. 145): "Now you must consider it reasonable to draw the inference and find that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted."

1985); *United States* v. *Caucci*, 635 F.2d 441, 447 (5th Cir.), cert. denied, 454 U.S. 831 (1981).

Furthermore, a single jury instruction may not be considered in isolation, but must be viewed in the context of the entire charge and the record of the trial, because the charge as a whole may clarify an ambiguous instruction or, by correctly stating the law, dissipate any prejudicial effect resulting from a single erroneous instruction. See, *e.g.*, *Francis*, slip op. 11; *Henderson* v. *Kibbe*, 431 U.S. 145, 152-156 (1977); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975). Here, the district court repeatedly instructed the jury that the government had the burden of proving petitioners' guilt beyond a reasonable doubt (C.A. App. 95, 97-98, 101, 103, 109-110, 111-112, 126, 127, 128, 134-135, 136-137, 137, 139, 140, 142-143, 144, 146, 177, 178, 180, 184A, 190, 193, 194, 195-196, 198), told the jury that it must consider the charge as a whole (*id.* at 93), and instructed the jury that it was "permitted to draw from any facts or evidence any reasonable inferences which a person serving as a juror would be permitted to draw from established facts" (*id.* at 92; see *id.* at 96, 101). The jury therefore could not have been confused on this issue.[3]

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[3]In any event, petitioners Love and Youngblood were not prejudiced by this instruction because their intent was not an issue at trial. Petitioner Love testified at trial and denied that he had committed any of the charged offenses; he also challenged the credibility of the government's witnesses (see 85-526 Pet. 6). Petitioner Youngblood did not testify or offer any evidence in her defense, but she sought to establish an alibi through cross-examination of the government's witnesses (C.A. App. 157). In these circumstances, any error in the instructions on intent was harmless. See *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion); *Martin* v. *Foltz*, 773 F.2d 711, 719 (6th Cir. 1985); *Tucker* v. *Kemp*, 762 F.2d 1480, 1496, 1501-1503 (11th Cir. 1985) (en banc); *Garland* v. *Maggio*, 717 F.2d 199, 203-204 (5th Cir. 1983); *McGuinn* v. *Crist*, 657 F.2d 1107, 1108-1109 (9th Cir. 1981), cert. denied, 455 U.S. 1107 (1982); cf. *United States* v. *Frady*, 456 U.S. 152, 169-174 (1982).

b. In defining a reasonable doubt, the district court told the jury that a reasonable doubt was "not a slight doubt" and was "not a fanciful doubt," but was "a fair doubt based upon reason and common sense, and arising from the state of the evidence[,] * * * a doubt for which you can assign a reason" (C.A. App. 97). The court also explained that "[p]roof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important affairs of your own life. A defendant is not to be convicted on mere suspicion or conjecture" (*ibid.*). The trial court further told the jury that a reasonable doubt exists "when after a careful and impartial consideration of all of the evidence, you the jury does [*sic*] not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges" (*id.* at 98). Petitioners Love and Youngblood contend (85-526 Pet. 9-10) that the latter two instructions diluted the government's burden of proof. The court of appeals, however, correctly found that the instructions, taken as a whole, did not constitute plain error.

The court's definition of a reasonable doubt as a "fair doubt based upon reason and common sense" was correct (see, *e.g., United States* v. *Del Toro Soto*, 676 F.2d 13, 17 (1st Cir. 1982)), and it is endorsed by 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 11.14 (1977). The instruction on "willingness to act" is consistent with, although phrased differently from, the instruction approved in *Holland* v. *United States*, 348 U.S. 121, 140 (1954). Addition of the "moral certainty" instruction did not make the entire charge improper. Although the "moral certainty" language has been criticized on the ground that it may induce the jury to decide the case based on its feelings rather than on the evidence,[4] where, as here, the instruction

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[4]The instruction can also be said to be unduly favorable to the defense, since the jury could construe the charge to require a higher standard of proof than proof beyond a reasonable doubt. Petitioners' failure to object may indicate satisfaction that the charge was favorable.

is part of a charge requiring the jury to base its verdict on the evidence (see, *e.g.*, C.A. App. 92, 93, 96-99), there is no realistic possibility that the jury will be confused. See *United States* v. *Drake*, 673 F.2d 15, 21 n.6 (1st Cir. 1982). Petitioners therefore were not prejudiced by this instruction. See *United States* v. *Del Toro Soto*, 676 F.2d at 17; *United States* v. *Drake*, 673 F.2d at 20-21; *United States* v. *Previte*, 648 F.2d 73, 83 (1st Cir. 1981); *United States* v. *Clayton*, 643 F.2d 1071, 1074-1075 (5th Cir. 1981); *United States* v. *Magnano*, 543 F.2d 431, 436-437 (2d Cir. 1976).[5]

c. The district court instructed the jury that it was the sole judge of the credibility of witnesses and that it should carefully scrutinize their testimony (C.A. App. 98). The court reiterated that principle with respect to the testimony of accomplices and informants (*id.* at 101-102). The court also instructed the jury to consider a witness's intelligence, motive, state of mind, and similar factors in evaluating the witness' credibility (*id.* at 99). The court further charged that "[i]f you find the presumption of truthfulness to be

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[5]None of the cases cited by petitioners (85-526 Pet. 9-10) holds that the use of this instruction amounts to plain error. In fact, only one case set aside a conviction because of an erroneous instruction on the term reasonable doubt, *Dunn* v. *Perrin*, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910 (1978), and the instructions in that case erroneously defined that term three times, in a manner that shifted the burden of proof to the accused (570 F.2d at 24-25).

Petitioners also criticize (85-526 Pet. 10) that portion of the charge telling the jury to "say so" whether a defendant was guilty or not (C.A. App. 148). However, the district court repeatedly instructed the jury on the government's burden of proof. Accordingly, there is no realistic possibility that this instruction led the jury to believe that the defendant bore the burden of proof, and no plain error arose from the giving of this instruction. See *United States* v. *Thomann*, 609 F.2d 560, 565 (1st Cir. 1979); *United States* v. *Urbanis*, 490 F.2d 384, 386-387 (9th Cir.), cert. denied, 416 U.S. 944 (1974); *United States* v. *Cummings*, 468 F.2d 274, 280-281 (9th Cir. 1972). None of the cases cited by petitioners (85-526 Pet. 10) is to the contrary.

outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves" (*ibid.*). Finally, the court charged that the jury had the exclusive power to give a witness such credibility as it deemed proper (*id.* at 100).

Although petitioners Love and Youngblood are correct (85-526 Pet. 11) that a "presumption of truth" instruction is disfavored, the use of that instruction does not automatically constitute reversible error. *Cupp* v. *Naughten*, 414 U.S. 141 (1973). For instance, when a defendant testifies or presents defense witnesses, as petitioner Love did in this case, he receives the benefit of the presumption in the same manner as the government's witnesses. Thus, as to petitioner Love, the instruction did not unfairly benefit the prosecution. See, *e.g.*, *United States* v. *Gutierrez-Espinosa*, 516 F.2d 249, 250 (9th Cir. 1975); *United States* v. *Boone*, 401 F.2d 659, 661-662 (3d Cir. 1968), cert. denied, 394 U.S. 933 (1969). Moreover, any potentially prejudicial effect of the instruction was substantially diluted by the court's other instructions on the meaning of a reasonable doubt, the government's burden of proof, and the jury's power to decide the credibility of witnesses and to reject testimony that it found unreliable. Those instructions correctly informed the jury of its duty to determine whether a witness was credible and thereby eliminated any prejudicial effect of the challenged instruction. In these circumstances, the use of the "presumption of truth" instruction did not constitute plain error. See *United States* v. *Ramos-Alganin*, 584 F.2d 562, 569 (1st Cir. 1978); *United States* v. *LaRiche*, 549 F.2d 1088, 1093-1094 (6th Cir.), cert. denied, 430 U.S. 987 (1977); *United States* v. *Chrisco*, 493 F.2d 232, 238 (8th Cir.), cert. denied, 419 U.S. 847 (1974); *United States* v. *Safley*, 408

F.2d 603, 605-606 (4th Cir.), cert. denied, 395 U.S. 983 (1969).[6]

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[6]Petitioners Love and Youngblood also contend (85-526 Pet. 11-12) that they were prejudiced by the district court's "mere presence" instruction. The district court gave the following instruction on the "mere presence" doctrine (Pet. App. 12a n.7; C.A. App. 146): "I would instruct you that mere presence at or near the scene of a crime, or where a crime was supposed to be committed, is insufficient to establish that a defendant joined a conspiracy or aided and abetted in the commission of the crime. If you should find that Ruiz and Restrepo were not willfully part of the conspiracy, or that they were—and that they were—and that they were merely present near where the crime was committed then it would be your duty to find them not guilty." Ruiz and Restrepo were co-defendants in this case and were acquitted on all of the charges against them. The district court gave the charge in this form because Ruiz and Restrepo had requested it. Petitioner Love and Youngblood contend that they were prejudiced by this instruction because only their co-defendants were specifically identified. That contention is not well-founded, and there is no conflict among the circuits on petitioners' fact-bound claim.

To begin with, petitioner Love erroneously asserts (85-526 Pet. 12) that he objected to the district court's charge on the mere presence doctrine. Petitioner Love's counsel initially stated that he had no objections to the charge (C.A. App. 157) and his later remarks, read in context, do not expressly state an objection to the charge (*id.* at 169). Moreover, the proof of Ruiz's and Restrepo's involvement in the smuggling operation was quite limited; they were arrested while driving a recreational vehicle outside of Lee's farm, and there was no direct proof that they were involved in the smuggling operation (10 Tr. 220-228, 252-256, 263, 273-286, 289-293; 11 Tr. 218-231). The proof of Love's and Youngblood's involvement was far more substantial. Beyond that, because both petitioners presented alibi defenses (see page 7 note 3, *supra*), the "mere presence" instruction was not relevant to their defenses. In any event, the jury charge, read as a whole, included them as well. The district court also instructed the jury that (C.A. App. 132): "Mere association between a principal and the accused of aiding and abetting is not sufficient to establish guilt, nor is mere presence at or near the scene, or even knowledge that the crime was being committed, sufficient, standing by itself, to establish aiding and abetting." This charge also referred to the "mere presence" doctrine, and it did not identify any particular defendant or suggest that it was inapplicable to petitioners.

2. Petitioner Lee contends (85-576 Pet. 13-32) that he was denied a fair trial because the prosecutor did not reveal the identity of a confidential government informant until shortly before the close of the government's case-in-chief. The court of appeals summarily rejected this insubstantial claim (Pet. App. 25a), and its ruling does not warrant further review.

As explained above, in mid-December 1982, Joseph Merolla, the owner of an airplane leasing company used by petitioner for a smuggling operation and also a confidential government informant, tipped off the DEA that petitioner Love was preparing to smuggle cocaine from Colombia to South Carolina by airplane on December 19 (Pet. App. 8a-9a). Merolla also tentatively identified Garrett Clark as the scheduled pilot of the transport plane (*id.* at 23a). On December 17, the Miami DEA office sent the DEA office in Columbia, South Carolina, a telex describing Merolla's tip, but not identifying him as its source (85-576 Pet. App. 85-86). The government furnished petitioner with a copy of the telex either before or during the trial (see Gov't C.A. Br. 52-53).

Before trial, petitioner Lee moved for disclosure of the identity of any government informants. The government moved to withhold its informants' identities until they had testified, "for security reasons" (85-576 Pet. App. 97), and the prosecutor told the court that all participating informants would testify (*id.* at 96-98). The court granted the government's motion. However, during the government's case-in-chief the prosecutor informed the district court that he had been unable to locate Merolla despite having issued two grand jury subpoenas and two trial subpoenas for him and despite having asked the Marshal's office, the DEA, and the FBI for their assistance in discovering Merolla's whereabouts. Shortly thereafter, the court ordered the government to disclose Merolla's identity to the defense,

and the government complied (9 Tr. 23-25, 83-85; 85-576 Pet. App. 99-101). Merolla did not testify at trial.[7]

Petitioner's claim appears to be that the government denied him a fair trial by failing to divulge Merolla's identity prior to trial, which deprived him of the opportunity to present an exculpatory defense witness. However, petitioner has failed to demonstrate that Merolla's expected testimony would have led to a different outcome at trial. See *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10. Merolla's tentative identification of Clark as the pilot of the transport plane several days before the actual flight took place was not exculpatory (see, *e.g.*, *Hughes* v. *Hopper*, 629 F.2d 1036, 1040 (5th Cir. 1980), cert. denied, 450 U.S. 933 (1981)), and the court of appeals found that there was "overwhelming evidence in the record implicating [petitioner] Lee and contradicting the 'tentative' identification of Clark as the pilot in the telex" (Pet. App. 23a (footnote omitted); see *id.* at 23a-24a n.14 (describing the evidence)). Accordingly, even assuming that petitioner Lee could have subpoenaed Merolla had he been aware of Merolla's identity before trial, there is no reasonable probability that Merolla's testimony would have led to petitioner's acquittal. See *Bagley*, slip op. 10-14.

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[7]At trial, petitioner Lee unsuccessfully sought to introduce the telex into evidence and to cross-examine a witness about its contents. Assuming that the district court had erred by denying petitioner the right to introduce the telex, the court of appeals held that any error was harmless given the overwhelming proof that Lee had piloted the aircraft (Pet. App. 23a & n.14). Lee has not sought review of that ruling in this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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